A.F.R.

(83)

HIGH COURT OF JUDICATURE, BILASPUR (CHHATTISGARH)

Writ Petition No. 2520 of 2003

PETITIONER: V. K. Punshi, aged about 62 years, Occupier: M/s Dharmsi Morarji Chemical Co. Ltd., Kumhari, R/o Makers Towers, A-103, 10th Mala, Kaif Parade, Mumbai.

Versus

RESPONDENTS:

1. State of Chhattisgarh, Through: Factory Inspector, Office of Deputy Director, Industrial Health & Safety, Durg.
2. President, Industrial Court, Near Mantralaya, Raipur (C.G.).
3. Labour Court (Magistrate 1st Class), Durg. (C.G.).

POST FOR ORDER ON 18th November, 2003

Sd/-
L.C. Bhadoo
Judge

18th November 2003

HIGH COURT OF JUDICATURE, CHHATTISGARH AT BILASPUR

Writ Petition No. 2520 of 2003

PETITIONER: V. K. Punshi, aged about 62 years, Occupier: M/s Dharmsi Morarji Chemical Co. Ltd., Kumhari, R/o Makers Towers, A-103, 10th Mala, Kaif Parade, Mumbai.

Versus

RESPONDENTS:

1. State of Chhattisgarh, Through: Factory Inspector, Office of Deputy Director, Industrial Health & Safety, Durg.
2. President, Industrial Court, Near Mantralaya, Raipur (C.G.).
3. Labour Court (Magistrate 1st Class), Durg. (C.G.).

Present:

Shri H.N. Vyas with Shri N.K. Vyas, Advocates for the petitioner.

Shri Ranbir Singh, Govt. Advocate, for the State/respondent No.1.

Before: Hon'ble Mr. Justice L.C. Bhadoo, J.

ORDER

(Passed on 18th November, 2003)

1. The petitioner has preferred this petition under Article 226/227 of the Constitution of India, challenging the order passed by the President, Industrial Court, Raipur dated 30th June 2003 and order dated 4-12-2001 passed by the Magistrate 1st Class (Labour Court) Durg, in Criminal Case No. 253/Factory Act/2001.

2. Brief facts leading to filing of this petition are that the petitioner is the Managing Director of M/s Dharmsi Morarji Chemical Ltd. Bombay. The company has a number of factories

through out the country manufacturing fertilizers, sulphuric acid etc. and one of the factory is situated at Kumhari, District Durg. The petitioner namely, V.K. Punshi is the occupier of this Kumhari unit under the Factories Act, 1948. On 17-10-2001, Factory Inspector, Durg, State of Chhattisgarh filed a complaint against the petitioner for contravention of Sections 7A(1) & 7A(2) (a) of the Factories Act, 1948 in the Court of Magistrate 1st Class (Labour Court) alleging that on 15th July 2001 at about 11 am one Shri Khorbahara Ram Sahu was fatally injured at mill No.2 as his forehead, right upper limp and left hand were crushed between the rollers of the mill when said Khorbahara Ram Sahu was engaged on lubricating the roller No.3 through the inspection opening provided in the body of the mill No.2 after removing the hinged cover provided on the inspection opening. No safety measure regarding removing the fuses/cutting of the power supply from the mains had been taken to prevent the inadvertent starting of the mill by a third agency like the mill operator of the mill. Therefore, the mill was inadvertently started by the mill operator from the mill operator's room resulting a death of the workman. Had there been a system of taking effective shutdowns of the mill No.2 under lubrication and maintenance, the accident could have been avoided.

3. The learned Labour Court on receiving this complaint issued the summons for appearance to the petitioner. An application under Section 205 of the Cr.P.C. for grant of permanent exemption from personal appearance on behalf of the accused/applicant was moved before the Labour Court requesting therein that as he is required to remain present at Head Office, Mumbai and also required to visit out of India for the purposes of company's business and the Head Office is situated at a distance of about 1400 kms. from Durg, therefore, to permit the accused/applicant to appear or to plead through an Advocate engaged by him namely Shri H.N. Vyas, R.N. Vyas, N.K. Vyas and S.P. Nath. It is very difficult for the applicant to remain present in the Court on each

and every date of hearing and he undertakes that he shall keep himself present in the Court as and when it is so deemed fit by the Hon'ble Court.

4. The learned Labour Court vide its order dated 4-12-2001 passed an order exempting the personal appearance of the applicant on that day and for future appearance the Court ordered that the request of the applicant is accepted with the condition that he would submit a personal bond and surety in the sum of Rs. 2,000/- and also the applicant to appear at the time of recording of his statement and also on the date of hearing. Aggrieved by this order, the petitioner/applicant moved a criminal revision under Section 397 of the Cr.P.C. in the Industrial Court, Chhattisgarh. The President of the learned Industrial Court vide impugned order dated 30th June 2003 dismissed the revision considering that the order passed by the Magistrate under Section 205 of the Cr.P.C. is interlocutory in nature, therefore, no revision lies against such order and it was further held that except in petty offences as described under Section 206 of the Cr.P.C. application for permanent exemption from personal appearance by the accused should be allowed only when the accused has appeared in the court and has furnished recognizance bonds, and there are sufficient and cogent grounds for allowing the application.

5. By this petition, the petitioner has challenged the above orders primarily on the ground that the order of the learned Industrial court is not legal, being not in accordance with the law as settled by the Hon'ble Apex Court and the High Courts, as the impugned order passed by the Labour Court was not an interlocutory in nature. Further judicial functioning of Shri D.S. Jain, President Industrial Court, Chhattisgarh without appointment of one or more members for the Court is contrary to Section 9 of the Chhattisgarh Industrial Relations Act, 2000, therefore, it is not legally constituted. However, during the course of arguments,

learned counsel for the petitioner/applicant has not pressed the second ground i.e. the Industrial Court, Chhattisgarh is not legally constituted Court.

6. I have heard Shri H.N. Vyas, counsel for the petitioner and Shri Ranbir Singh, Government Advocate for the State/respondent No.1.

7. The learned counsel for the petitioner argued that the order passed by the learned Presiding Officer, Labour Court (Magistrate 1st Class) is not interlocutory in nature as the same effects the rights of the petitioner by disallowing the application of the petitioner. The petitioner has been asked to appear before the Court and furnished a personal bond and thereafter to appear on the date of recording of the statement under Section 313 of the Cr.P.C. and also to remain present on the date of arguments being contrary to the settled law. He further argued that in view of the settled law on the point, the learned Labour Court ought to have exempted the petitioner from personal appearance before that Court permanently and that Court ought to have allowed the petitioner to appear through a counsel and even statement under Section 313 of the Cr.P.C. could have been recorded through the counsel. Realizing the difficulty expressed by the petitioner as he was residing at a very distant place, he was engaged in the business, and he was required to go various parts of the country and also abroad. He further argued that the offence is punishable with 2 years imprisonment and fine of Rs. 1 lakh, therefore, the offence is triable as summons case.

8. On the other hand, learned Government Advocate argued that learned Labour Court has, by and large, accepted the application under Section 205 of the Cr.P.C., but the learned Labour Court considered the presence of the accused/petitioner necessary on the first date of hearing for furnishing the personal bond and

surety as also for recording his statement and also on the dates of hearing, therefore, the petition does not lie.

9. As far as the question of nature of the impugned order is concerned, whether the order passed by the learned Labour Court is interlocutory in nature, therefore, the revision against that order is barred as per the provisions of Section 397 (2) of the Cr.P.C. In this connection, similar question came up for consideration before the Hon'ble Apex Court in the matter of **Amar Nath v. State of Haryana** reported in **AIR 1977 SC 2185** and the Court observed that " it was a matter of moment and it decided the serious question as to the rights of the appellants to be put on trial and as such was not an interlocutory order and consequently the revision was declared to be competent and holding that an interlocutory order was being equated with an order of purely interim and temporary nature or an order which could be in the nature of an order embracing items which could be steps in aid of the proceeding; whereas the other aspects were lifted out of the purview of such concept. It was specifically observed that any order of moment or an order which substantially affects the rights of parties or decides certain rights of the parties could not be said to be an interlocutory and a further category was envisaged which could be treated as intermediate order, which could in proper cases be taken out of the sweep of interlocutory order."

10. Again in **Madhu Limaye's** case **(1978 Cri. L.J. 165) (SC)** the concept of interlocutory nature of an order which was high-lighted in **Amar Nath's** case was reiterated and in the said case the appellant therein had taken a preliminary objection at the threshold of the criminal proceeding about the jurisdiction of a Court at Bombay and it is in that context, it was observed that when the High Court declined to interfere with the decision of the said issue which would go to the root of the matter ousting the jurisdiction of the Court and thus had a capacity of

terminating the proceeding. However, there is one feature which strikingly occurs during the course of the observation and which has some relevance. The Supreme Court by another limb of reasoning indicated that if any occurrence falling short of finality is to be embraced by term "interlocutory order", then the legislative intent would end into frustration and it was accordingly observed that such an interpretation and universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by Section 397 (1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the ones in the 1898 Code.

11. Again in the matter of **V.C. Shukla v. State through C.B.I.** reported in **AIR 1980 SUPREME COURT 962**, the Hon'ble Apex Court observed that " the word 'interlocutory order' used in Section 397 (2) of the Code relates to various stages of the trial, namely, appeal, inquiry, trial or any other proceeding. The object seems to be to cut down the delays in stages through which a criminal case passes before it culminates in an acquittal, discharge or conviction. Having regard to the very large ambit and range of the Code, the expression 'interlocutory order' would have to be given a broad meaning so as to achieve the object of the Act without disturbing or interfering with the fairness of the trial. The term 'interlocutory order' used in the Code of Criminal Procedure has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial because the bar contained in Section 397 (3) of the Code would apply to a variety of cases coming up before the courts not only being offences under the Penal Code but under numerous Acts. The revisional power of the High Court or the

Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi final."

12. Hon'ble Apex Court in the matter of **Bhaskar Industries Ltd. Versus Bhiwani Denim & Apparels Ltd. and others** reported in **(2001) 7 Supreme Court Cases 401** after discussing the law laid down in the abovementioned case held that "the interdict contained in Section 397 (2) is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The safe test is this: if the contention of the petitioner who moves the superior court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If they would, then the order is not interlocutory in spite of the fact that it was passed during any interlocutory stage. The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceeding, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397 (2) of the Code. In this case also the question was regarding the exemption of the accused from personal appearance and the Court reached to the conclusion that in the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."

13. The High Court of Madhya Pradesh in the matter of **Akram & another versus State of M.P.** reported in **(2000) 1 ACC 614** held that "the order passed regarding rejecting the application of personal exemption is not an interlocutory order." Similarly, the High Court of Bombay in the matter of **Hasmukh J. Jhaveri v. Sheila Dadlani and another** reported in **1981 CRI. L. J. 958** interpreted the meaning of interlocutory order after relying

(9t)

on the above decisions of the Apex Court held that the question (a) decides; or (b) even touches the important rights or liabilities of the parties; cannot be said to be interlocutory. An order which - (a) substantially affects the rights of the parties or (b) decides certain rights of the parties; cannot be termed as 'interlocutory'. An order which - (a) adjudicates; or (b) even affects - (i) either the rights of the parties; (ii) even any particular aspect of the trial or the proceeding cannot be also termed as 'interlocutory order'. In view of the above law settled by the Hon'ble Apex Court even the fact that the main proceeding is kept alive that does not ipso facto give a stamp to several such orders as "interlocutory order". The potential capacity to terminate proceeding or to give it a label of finality is also not the only and conclusive criterion, though it by itself is a relevant feature. Similarly, though a stamp of finality to the proceeding or termination of the proceeding may be quite a relevant and important consideration, yet it is not a sole criterion of the test in that behalf. Irrespective of the order bearing stamp of finality, there may be an intervening stage which can be called as 'intermediate stage' at which an order may be passed which in turn may be called as "intermediate order", which neither gives the finality to the proceeding nor is purely interim or temporary and as such is not an interlocutory order, but would fall in between and in certain cases such order can be said to be not interlocutory.

14. Therefore, in view of the above propositions of law on the point, if we look into the facts of the present case the petitioner requested that he was residing at a distance of 1400 kms. from Durg, he was engaged in the business activities and he was required frequently to go to various parts of India and abroad. It was very difficult for him to appear, therefore, his personal attendance may be exempted and he be permitted to appear or to plead through an advocate as per the provisions of Section 205 of the Cr.P.C. which the learned Labour Court allowed partially

with conditional order which has been mentioned above. This definitely affects the rights of the petitioner. If this application was allowed then this proceeding would have been terminated finally in favour of the petitioner because his personal appearance would have been exempted. Therefore, the finding of the learned Industrial Court that the order passed by the Labour Court is interlocutory in nature does not stand to the law laid down on the point. Therefore, the finding of Industrial Court on this aspect is not legal and correct.

15. Now, coming to the second question, in the circumstances, whether the petitioner is entitled for permanent exemption from appearance before the Court. The charges against the petitioner are under Sections 7A (1) and 7A(2)(a) of the Factories Act, 1948 which is punishable up to two years imprisonment and fine of Rs. 1 lakh, therefore, this offences are triable as summons case. Section 205 of the Cr.P.C. reads as under:-

> "(1) Whenever a Magistrate issues a sommons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.
>
> (2) But the Magistrate inquiring into or trying the case, may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided."

16. As mentioned above, similar question came for consideration before the Hon'ble Apex Court in the matter of **Bhaskar Industries Ltd. (Supra)** in which the petitioner/accused was required to appear before the Magistrate to face the charge under Section 138 of Negotiable Instruments Act and the Hon'ble Apex Court held that Sections 251 and 205(1) of the Code make it clear that in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the

(93)

accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. It is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice.

17. In the matter of **Chandu Lal Chandraker v. Puran Mal and another** reported in **AIR 1988 SUPREME COURT 2163** the Court held that "personal attendance of accused at trial dispensed with - Accused ordered to appear personally before court for examination - Statement made by accused before Supreme Court that he does not want to answer any of the questions put to him by court and would not raise question of prejudice at any stage - Order to personally appear for examination set-aside".

18. As per our Criminal Justice System the concern of the criminal court should primarily be the expeditious administration of

criminal justice. For that purpose the proceedings of the court in a case should register progress. Presence of the accused in the court is not for making his attendance just for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case. Therefore, the main concern of the criminal court is to see that the trial must progress expeditiously and without any hindrance and if in the absence of the accused the trial can be proceeded with, the Magistrate should in the ordinary course dispense with the personal attendance of the accused. Even that can be exempted on the first date of hearing and during the further course of hearing and even at the stage of recording the statement of the accused under Section 313 of the Cr.P.C. and the statement can be recorded through an advocate. One precaution which the learned Magistrate is required to take that before granting permanent exemption, he should obtain an undertaking from the accused that the plea of the guilt can be recorded through his advocate. The statement under Section 313 of the Cr.P.C. can be recorded through his advocate and witnesses can be examined in his absence and they will be cross-examined by his advocate and he will not raise any objection regarding his identity and further that for his absence during the above stages of the hearing, he will not raise any objection regarding the prejudice caused to him on account of his absence during the trial.

19. The offences which are triable as summons case are not serious in nature. However, in serious offences, the Court can insist upon the attendance of the accused and discretion has been given to the court under Sections 205 and 317 of the Cr.P.C. to exempt the personal attendance of the accused. The discretion which has been given to the court must be exercised judiciously and it

should not be exercised in an arbitrary or unreasonable manner just for making the attendance of the accused for the sake of seeing him in the Court. When the accused himself ready to give an undertaking that he will not raise the question of prejudice to him then in a summons case ordinarily personal exemption of the accused looking to his hardship and his engagement as narrated above by the Hon'ble Apex Court that the court while deciding the personal exemption application must take into consideration these factors. As everyone knows in our judicial system an adjournment in criminal proceeding is granted liberally and by personal appearance the harassment, wastage of time and money in attending the Courts is more rigorous punishment than the punishment awarded in the offence itself and that is why at the time of the final judgment in a criminal case the Courts are generally taking into consideration the fact of harassment, financial loss and other relevant factors faced by the accused during the trial.

20. The ultimate object of the criminal court is to decide the criminal case expeditiously as early as possible and if the absence of the accused does not create any hindrance in the proceeding and in progress of the case like petty cases and summons cases then ordinarily the court should dispense with the personal attendance. The various provisions contained in the Criminal Procedure Code are in order to ensure that a fair and reasonable opportunity should be given to the accused to defend his case as also to the prosecution to prove their case and no-one should have any grudge that he has not been given proper opportunity. These safeguards are necessary in a criminal case that neither the right of prosecution nor the right of accused should be prejudiced on account of any order of the Court and the principle behind securing personal presence of the accused during the course of hearing is that the case should proceed in his presence. If the witnesses are examined in his presence then he is able to assist his advocate to cross-examine those witnesses. Moreover,

(96)

if the plea of the accused is recorded at the beginning of the trial then he is the best person to explain about the offence alleged against him. Moreover, at the time of examination of the accused under Section 313 of the Cr.P.C. any circumstance appearing against the accused put to him then he is the best person to explain those circumstance and similarly at the time of the final hearing also during the course of arguments he is the best person to assist his advocate to argue his case. But when the accused himself volunteers that all these steps can be taken in his absence and he will not raise any objection regarding the prejudice caused to him during the trial then the Court should normally exempt the personal attendance of the accused to achieve the ultimate object of expeditious disposal.

21. However, as per the provisions of sub-section 2 of Section 205 and sub-section 2 of Section 317 of the Cr.P.C. discretion has been given to the Court that if the Magistrate considers the personal attendance of the accused necessary for reasons to be recorded, he can enforce such attendance of the accused and this discretion as per the settled law the Magistrate must exercise in a judicious manner. When Magistrate feels that for particular reason and particular purpose the personal attendance of the accused is necessary in the case, therefore, after assigning the reason as to why the presence of the accused is required on that day, he can within his rights order for enforcing such attendance of the accused.

22. In view of the above, the petition is allowed. The impugned orders of the learned Labour Court (Magistrate 1st Class) and learned Industrial Court dated 30-6-2003 are liable to be set-aside as the same are not in conformity with the principles of law settled by the various High Courts and Hon'ble Apex Court and the same are set-aside. The matter is remanded back to the learned Magistrate i.e. Labour Court to proceed with the trial of

the case and to pass an order on the application of the accused in accordance with law.

23. The Registry with the permission of Hon'ble the Chief Justice to circulate this order in the subordinate courts for guidance.

Sd/-
L.C. Bhadoo
Judge

Barve*